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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Cristobal Hernandez, Jr.,

9 Plaintiff,

10 v.

11 Benjamin Parry,

12 Defendant.
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No. CV 11-1945-PCT-JAT

ORDER

14 Pending before the Court are: (1) Plaintiff's Motion for Reconsideration (Doc.
15 113); (2) Defendant's Motion for Summary Judgment (Doc. 115); (3) Plaintiff's Motion
16 to File Supplement (Doc. 122); (4) Defendant's Motion to Strike (Doc. 127); (5)
17 Plaintiff's Request for Leave to File Amended Response (Doc. 128); (6) Defendant's
18 Motion to Strike (Doc. 133); (7) Plaintiff's Request for Leave to File Rule 60(b)(4) Relief
19 from Judgment (Doc. 134); (8) Plaintiff's request that the Court review exhibits (Doc.
20 140); (9) Defendant's Motion to Strike (Doc. 150); (10) Plaintiff's Request for Leave to
21 File Letter (Doc. 154); (11) Plaintiff's Request for Leave to File Exhibit 1 and 2 (Doc.
22 161); (12) Plaintiff's Request for Telephonic Call (Doc. 164); and (13) Plaintiff's Motion
23 to Withdraw Request for Telephonic Call and Leave to File for Consideration based on
24 Ninth Circuit Decisions (Doc. 165).

25 **I. Plaintiff's Motion for Reconsideration (Doc. 113)**

26 On July 9, 2012, in a reasoned Order, the Court granted Defendants' Motion to
27 Dismiss twenty-one counts of Plaintiff's twenty-two count Amended Complaint. (Doc.
28 42). Since the Court's ruling on Defendants' Motion to Dismiss, Plaintiff has filed

1 various motions for reconsideration and objections to that Order. Plaintiff's primary
2 argument in each of the motions for reconsideration is that the Court wrongly decided the
3 issues raised by the Motion to Dismiss.

4 On March 15, 2013, in a reasoned Order, the Court denied Plaintiff's Motion for
5 Rule 54(b) certification of its Order granting the Motion to Dismiss. (Doc. 110). In that
6 same Order, the Court also denied Plaintiff's Motion for Change of Venue. (*Id.*).
7 Plaintiff now seeks reconsideration of that Order. (Doc. 113). Plaintiff's basis for
8 reconsideration is that the Court's Order granting the Motion to Dismiss was wrongly
9 decided. Plaintiff's belief that the Order granting the Motion to Dismiss was wrongly
10 decided is not a basis for reconsideration of this Court's Order denying Rule 54(b)
11 certification. As a result, Plaintiff's Motion for Reconsideration (Doc. 113) is denied.

12 In the alternative, Plaintiff requests that the Court explain how the Court
13 "developed its finding with regards to absolute or qualified immunity" in its Order
14 granting Defendants' Motion to Dismiss. (Doc. 113 at 6). The Court's legal analysis is
15 contained in the Court's Order granting Defendants' Motion to Dismiss. To the extent
16 Plaintiff disagrees with the Court's analysis, Plaintiff may appeal that decision at the
17 proper time. To the extent Plaintiff seeks legal advice explaining the Court's analysis,
18 Plaintiff must consult an attorney, as it is not appropriate for this Court to act as
19 Plaintiff's legal counsel in this case. Accordingly, Plaintiff's alternative request that the
20 Court provide Plaintiff a more detailed explanation of its Order granting Defendants'
21 Motion to Dismiss is denied.

22 **II. Plaintiff's Motion to File Supplement (Doc. 122)**

23 On April 15, 2013, Plaintiff filed a "Request for Leave to File Supplemental to
24 Objection for Summary Judgment." (Doc. 122). In his Request, Plaintiff argues that
25 Defendant's April 10, 2013 Sixth Supplemental Disclosure Statement revealed new
26 information, making it necessary for him to supplement his response to Defendant's
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1 Motion for Summary Judgment.

2 In Response, Defendant argues that the Request for Leave and the supplemental to
3 the objection should be denied because it is not in compliance with the Federal Rules of
4 Civil Procedure and this Court's local rules governing motions for summary judgment.

5 The Court agrees with Defendant that the "Supplemental to Objection" is in
6 violation of this Court's local rules and is an unauthorized sur-reply. Although Plaintiff
7 is proceeding pro se, this Court has repeatedly warned Plaintiff that he must comply with
8 the Federal Rules of Civil Procedure and this Court's local rules. This warning has gone
9 unheeded. Plaintiff's complete disregard for this Court's prior Orders and his insistence
10 on driving up the costs of this litigation are troubling to say the least.

11 The Court will nonetheless consider the Supplemental to Objection for Summary
12 Judgment (Doc. 122 at 5-41) in ruling on the Motion for Summary Judgment.
13 Accordingly, Plaintiff's Motion to File Supplement (Doc. 122) is granted to the extent
14 that the Court will consider the Supplemental to Objection for Summary Judgment (Doc.
15 122 at 5-41) in ruling on the Motion for Summary Judgment.

16 **III. Defendant's Motion to Strike (Doc. 127)**

17 On April 22, 2013, Plaintiff filed a "Notice." (Doc. 126). In his "Notice,"
18 Plaintiff stated his intention to file a "Motion Requesting Leave to Amend his Response
19 to Defendant Parry's Motion for Summary Judgment." Defendant moves to strike this
20 "Notice" as an unauthorized sur-reply. It is unclear why Plaintiff filed the "Notice." The
21 Notice itself is not a Court Order and does not require the Court to give Plaintiff leave to
22 amend his response to the Motion for Summary Judgment. Moreover, the Notice does
23 not appear to be responsive to the Motion for Summary Judgment. Likewise, the Notice
24 is not a motion to the Court. Accordingly, the Court is unaware of what purpose Plaintiff
25 believes this Notice serves and the Notice will not be considered to be a response to the
26 Motion for Summary Judgment. However, Defendant's Motion to Strike the Notice
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(Doc. 127) is denied.

IV. Plaintiff's Request for Leave to File Amended Response (Doc. 128) and Defendant's Motion to Strike (Doc. 133)

On April 28, 2013, Plaintiff filed a "Request for Leave to File Amended Response." (Doc. 128). To this Request, Plaintiff attached an Amended Response to Defendant Parry's Separate Statement of Facts in Support of his Motion for Summary Judgment. Plaintiff argues that this "Amended Response" should be considered because it purportedly corrects the deficiencies in Plaintiff's original responses identified by Defendant in his Reply in Support of his Motion for Summary Judgment.

In Response, Defendant argues that the Request for Leave and the proposed amended response should be denied because they violate a Court Order, are unauthorized sur-replies to the Motion for Summary Judgment, and are not supported by good cause.

The Court agrees with Defendants that the Amended Response is in violation of this Court's local rules and there is no good cause to file an Amended Response. The Amended Response is Plaintiff's attempt to fix the deficiencies in his original response that were identified by Defendant in his Reply in Support of his Motion for Summary Judgment. Although Plaintiff is proceeding *pro se*, this Court has repeatedly warned Plaintiff that he must comply with the Federal Rules of Civil Procedure and this Court's local rules. This warning has gone unheeded. Plaintiff's complete disregard for this Court's prior Orders and his insistence on driving up the costs of this litigation are troubling to say the least.

The Court will nonetheless consider the Amended Response to Defendant Parry's Separate Statement of Facts (Doc. 128 at 13-35) in ruling on the Motion for Summary Judgment. Accordingly, Plaintiff's Request for Leave to File Amended Response (Doc. 128) is granted to the extent that the Court will consider the Amended Response to Defendant Parry's Separate Statement of Facts (Doc. 128 at 13-35) in ruling on the

1 Motion for Summary Judgment.

2 Defendant moves to strike Plaintiff's Reply in Support of his Request for Leave to
3 File an Amended Response (Doc. 130). Defendant argues that the Reply is another
4 unauthorized sur-reply to the Motion for Summary Judgment. However, the reply is a
5 Reply in Support of Plaintiff's Request to Amend and will not be considered to be a
6 response and/or sur-reply to the Motion for Summary Judgment. Plaintiff was acting
7 within the rules when he filed a timely reply in support of his Request for Leave to File
8 an Amended Response. Accordingly, Defendant's Motion to Strike (Doc. 133) is denied.

9 **V. Plaintiff's Request for Leave to File Rule 60(b)(4) Relief from**
10 **Judgment (Doc. 134)**

11 On May 24, 2013, Plaintiff filed a "Request [sic] Leave to File Rule 60(b)(4)
12 Relief from Judgment" (Doc. 134). In his Motion for Relief from Judgment, Plaintiff
13 seeks relief pursuant to Federal Rules of Civil Procedure 60(b)(1), (4), and (6).
14 Plaintiff's Motion appears to be premised on his belief that this Court's Order striking his
15 amended complaint was in error because Plaintiff filed his amended complaint within the
16 deadline for filing **motions** to amend the complaint as set forth in the Rule 16 Scheduling
17 Order. (Doc. 134 at 7). Plaintiff's motion then transitions into another response to
18 Defendant's Motion for Summary Judgment. To the extent Plaintiff's Motion for Relief
19 from Judgment is intended to be a response to Defendant's Motion for Summary
20 Judgment, the arguments made in the Motion for Relief from Judgment will not be
21 considered in ruling on Defendant's Motion for Summary Judgment.

22 To the extent Plaintiff's Motion for 60(b)(4) Relief is a Motion for
23 Reconsideration of the Court's Order striking Plaintiff's Amended Complaint, the Motion
24 is denied. In an Order of September 28, 2012, the Court struck an Amended Complaint
25 filed by Plaintiff because Plaintiff filed the Amended Complaint without leave of Court
26 in violation of Federal Rule of Civil Procedure 15(b)(2) and LRCiv. 15.1. (Doc. 67).

1 Plaintiff argues that, when the Court set a deadline by which all **motions** to amend the
2 complaint should be filed at the Rule 16 Scheduling Conference, Plaintiff considered the
3 setting of that deadline on which **motions** to amend were due to be implicit permission to
4 file any amended complaint before that deadline without seeking further leave of Court.

5 Plaintiff argues that “[o]n September 10, 2012, during a Scheduling Conference
6 this Court said, ‘Any motion to amend the complaint would be due by September 30’. . . .
7 Plaintiff did not request leave, as the Court had given permission to file an amended
8 complaint during the September 10, 2012, Scheduling Conference.” (Doc. 134)
9 (emphasis in original). Plaintiff acknowledges that the Court stated that any **motion** to
10 amend would be due by September 30 and then concludes that statement somehow
11 resulted in allowing Plaintiff to file an amended complaint without first filing a **motion** to
12 amend. Plaintiff’s unwarranted conclusion is simply incorrect and is not a basis for relief
13 pursuant to Federal Rules of Civil Procedure 60(b)(1), (4), or (6).

14 Moreover, although the Court struck Plaintiff’s Amended Complaint, the Court
15 also later considered Plaintiff’s Motion to Amend on the merits and denied it. (Doc. 71 at
16 4). Accordingly, Plaintiff’s Request for Leave to File Rule 60(b)(4) Relief from
17 Judgment (Doc. 134) is denied.

18 **VI. Plaintiff’s request that the Court review exhibits (Doc. 140)**

19 On June 14, 2013, Plaintiff filed a “Declaration.” The Declaration states that
20 Plaintiff has come to the conclusion that the undersigned is “demonstrating bias.” (Doc.
21 140 at 2). Plaintiff then requests that the undersigned “personally review the attached
22 exhibits and advised [sic] how absolute or qualified immunity applies.” (Doc. 140 at 3).
23 This “declaration” is yet another motion for reconsideration of this Court’s Order
24 granting Defendants’ motion to dismiss. As the Court stated above, to the extent Plaintiff
25 disagrees with the Court’s analysis, Plaintiff may appeal that decision at the proper time.
26 To the extent Plaintiff seeks legal advice explaining the Court’s analysis, Plaintiff must

1 consult an attorney, as it is not appropriate for this Court to act as Plaintiff's legal counsel
2 in this case. Accordingly, Plaintiff's request that the Court review exhibits (Doc. 140) is
3 denied.

4 **VII. Defendant's Motion to Strike (Doc. 150)**

5 On July 3, 2013, Defendant filed a Notice of Service of 7th Supplement
6 Disclosure Statement (Doc. 148). Plaintiff then filed a "Response" to the Notice of
7 Service. (Doc. 149 at 1). The response appears to raise various discovery disputes.
8 Defendant moves to strike the response as a violative of the Court's Rule 16 Scheduling
9 Order, which requires the Parties to contact the Court to arrange for a discovery dispute
10 hearing and to obtain leave from the Court before filing written motions regarding
11 discovery disputes. The Court agrees that the Response to the Notice of Service is a
12 discovery dispute filed without leave of Court and is, thus, in violation of this Court's
13 Rule 16 Scheduling Order. (Doc. 64 at 4). Accordingly, Defendant's Motion to Strike
14 (Doc. 150) is granted.

15 **VIII. Plaintiff's Request for Leave to File Letter (Doc. 154)**

16 Plaintiff requests that a letter Plaintiff wrote be submitted into the record. There is
17 no basis for Plaintiff to file evidence into the record absent an appropriate procedural
18 vehicle, such as attached as an exhibit to a Motion for Summary Judgment. Accordingly,
19 Plaintiff's Request for Leave to File Letter (Doc. 154) is denied.

20 **IX. Plaintiff's Request for Leave to File Exhibit 1 and 2 (Doc. 161)**

21 Plaintiff seeks leave to file two exhibits that Plaintiff "inadvertently left out of Doc
22 160." (Doc. 161). Doc. 160 is a document entitled "Supplemental Based on Court of
23 Appeals, August 8, 2013 Opinion." Plaintiff's "Supplemental" (Doc. 160) appears to be
24 another Motion for Reconsideration of this Court's Order granting Defendants' Motion to
25 Dismiss. Plaintiff's Motion for Reconsideration is untimely, is a violation of this Court's
26 prior Orders, and is without merit as discussed in the Court's prior Orders ruling on
27

1 Plaintiff's various motions for reconsideration of the Court's Order granting Defendant's
 2 Motion to Dismiss. Accordingly, Plaintiff's Request for Leave to File Exhibit 1 and 2
 3 (Doc. 161) is denied.

4 **X. Plaintiff's Request for Telephonic Call (Doc. 164) and Plaintiff's**
 5 **Motion to Withdraw Request for Telephonic Call and Leave to File for**
 6 **Consideration based on Ninth Circuit Decisions (Doc. 165)**

7 On August 20, 2013, Plaintiff filed a document entitled "Request Telephonic
 8 Conference Call." On August 22, 2013, Plaintiff withdrew his request for a telephonic
 9 conference call. (Doc. 165 at 2). Accordingly, Plaintiff's Request for Telephonic Call
 10 (Doc. 164) is denied as moot.

11 On August 22, 2013, Plaintiff filed another Motion for Reconsideration of this
 12 Court's Order granting Defendants' Motion to Dismiss. Plaintiff's Motion for
 13 Reconsideration is untimely, is a violation of this Court's prior Orders, and is without
 14 merit as discussed in the Court's prior Orders ruling on Plaintiff's various motions for
 15 reconsideration of the Court's Order granting Defendant's Motion to Dismiss.
 16 Accordingly, Plaintiff's Motion to Withdraw Request for Telephonic Call and Leave to
 17 File for Consideration based on Ninth Circuit Decisions (Doc. 165) is denied.

18 **XI. Defendant's Motion for Summary Judgment (Doc. 115)**

19 On March 26, 2013, Defendant Parry filed a Motion for Summary Judgment (Doc.
 20 115). On April 2, 2013, Plaintiff filed a Response to the Motion for Summary Judgment
 21 (Doc. 118). On April 19, 2013, Defendant filed a Reply in Support of his Motion for
 22 Summary Judgment (Doc. 123). On July 11, 2013, Plaintiff then filed a "Notice"
 23 regarding Defendant Parry's Motion for Summary Judgment (Doc. 151)¹ and, on August

24
 25 ¹ The majority of Plaintiff's argument in his "Notice" (Doc. 151) is another
 26 Motion for Reconsideration of this Court's Order granting Defendants' Motion to
 27 Dismiss. The Court will only consider this Notice to the extent it supports Plaintiff's
 28 opposition to Defendant Parry's Motion for Summary Judgment.

1 1, 2013, another Response to Defendant Parry's Motion for Summary Judgment (Doc.
2 158). Moreover, as discussed above, Plaintiff has also filed a Supplemental to Objection
3 for Summary Judgment (Doc. 122 at 5-41) and an Amended Response to Defendant
4 Parry's Separate Statement of Facts (Doc. 128 at 13-35). Accordingly, Plaintiff has filed
5 a total of five responses to the Motion for Summary Judgment, four of which were
6 untimely filed after Defendant Parry filed his Reply in Support his Motion for Summary
7 Judgment.

8 Moreover, Plaintiff's various responses fail to comply with Federal Rule of Civil
9 Procedure 56 and LRCiv 56.1 in nearly every conceivable way. Although Plaintiff is
10 proceeding pro se, there is no excuse for Plaintiff's failure to follow the Federal Rules of
11 Civil Procedure and this Court's local rules. The Court has repeatedly warned Plaintiff
12 that he must follow the rules and that failure to follow the rules could result in dismissal
13 of Plaintiff's case. (*See* Doc. 67 at 1-2; Doc. 71 at 1-2; Doc. 81 at 1).

14 Indeed, Plaintiff has previously argued in this case that his ignorance of the law
15 excuses his inability to follow this Court's rules. (*See* Doc. 71 at 2). At that time, the
16 Court specifically reminded Plaintiff that "he is subject to the same rules and limitations
17 placed on attorneys and that he will not be granted immunity from the rules merely
18 because he is proceeding pro se." (*Id.* at 2 (internal citations omitted)). As a result,
19 Plaintiff should not be surprised that he is required to follow the Federal Rules of Civil
20 Procedure and this Court's local rules. As noted above, Plaintiff's complete disregard for
21 this Court's prior Orders, the rules of Court, and his insistence on driving up the costs of
22 this litigation are troubling and cause significant prejudice to Defendant.

23 Nonetheless, while the Ninth Circuit Court of Appeals has repeatedly warned that
24 "[p]ro se litigants must follow the same rules of procedure that govern other litigants,"
25 *see, e.g., King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), the Court of Appeals has also
26 stated that, when a plaintiff is proceeding pro se, "in evaluating his compliance with the
27

1 technical rules of civil procedure, [the court] treat[s] him with great leniency.” *Draper v.*
 2 *Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). Accordingly, the Court will evaluate all five
 3 of Plaintiff’s “responses” to Defendant’s Motion for Summary Judgment in deciding
 4 whether summary judgment is appropriate.²

5 **A. Legal Standard**

6 Summary judgment is appropriate when “the movant shows that there is no
 7 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 8 of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely
 9 disputed must support that assertion by . . . citing to particular parts of materials in the
 10 record, including depositions, documents, electronically stored information, affidavits, or
 11 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by
 12 “showing that materials cited do not establish the absence or presence of a genuine
 13 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
 14 *Id.* at 56(c)(1)(A)&(B). Thus, summary judgment is mandated “against a party who fails
 15 to make a showing sufficient to establish the existence of an element essential to that
 16 party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*
 17 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

18 Initially, the movant bears the burden of pointing out to the Court the basis for the
 19 motion and the elements of the causes of action upon which the non-movant will be
 20 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
 21 the non-movant to establish the existence of material fact. *Id.* The non-movant “must do
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23 ² The Court notes that, throughout Plaintiff’s responses, he repeatedly accuses
 24 Defendant of withholding discovery. These assertions are wholly unsupported by
 25 Plaintiff and have not been brought to the Court through the appropriate discovery
 26 dispute procedures outlined in the Court’s Rule 16 Scheduling Order and as explained at
 27 the Rule 16 Scheduling Conference. Accordingly, the Court will not further address
 28 Plaintiff’s arguments related to the insufficiency of discovery.

1 more than simply show that there is some metaphysical doubt as to the material facts” by
 2 “com[ing] forward with ‘specific facts showing that there is a genuine issue for trial.’”
 3 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
 4 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the
 5 evidence is such that a reasonable jury could return a verdict for the nonmoving party.
 6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the summary judgment
 7 context, the Court construes all disputed facts in the light most favorable to the non-
 8 moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

9 **B. Analysis**

10 The only remaining Count of Plaintiff’s Amended Complaint (Doc. 16)³ is Count
 11 7, wherein Plaintiff alleges a § 1983 claim against Defendant Parry based on an alleged
 12 Fourth Amendment violation during a traffic stop. (Doc. 16). Defendant Parry now
 13 moves for summary judgment on Count 7.

14 On October 6, 2009 at around 9:00 a.m., Deputy Parry received a telephone call
 15 from a supervisor of the Narcotics Unit regarding a white Chevy truck moving between
 16 Arizona City and Casa Grande. (Doc. 116 at ¶ 1). The white Chevy truck was a possible
 17 vehicle of interest in a drug trafficking investigation. (*Id.*). At around 9:34 a.m., Deputy
 18 Parry observed a vehicle matching the description of the vehicle of interest with an
 19 inoperable brake light and performed a traffic stop. (*Id.* at ¶ 2).⁴ As Deputy Parry
 20 approached the driver’s side window, Plaintiff was holding his driver’s license, insurance

21 ³ Doc. 15 is also labeled “Amended Complaint” and appears to be an incomplete
 22 version of Doc. 16. Therefore, the operative complaint is the Amended Complaint at
 23 Doc. 16.

24 ⁴ In Response to a Request for Admission, Plaintiff stated that he did not know
 25 whether the brake light was inoperable and that only Defendant Parry could answer that
 26 question. (Doc. 116 at ¶ 3). In that Response, Plaintiff also admitted that, after the traffic
 27 stop, “the brake light sometimes functioned. Plaintiff eventually changed the right rear
 28 brake line harness.” (Doc. 125 at ¶ 11).

1 card, and registration out of the driver's side window. (*Id.* at ¶ 4).⁵ Deputy Parry took
2 Plaintiff's documents and explained to Plaintiff that he was stopped because of an
3 inoperable right brake light. (*Id.* at ¶ 5). Plaintiff responded, "Yes, sir. Sorry, sir" and
4 Deputy Parry observed that Plaintiff appeared nervous by a tremble in Plaintiff's voice
5 and Plaintiff's failure to make eye contact. (*Id.*).

6 Deputy Parry ran a driver's license and registration check and learned that
7 Plaintiff's driver's license and registration were valid, but that his insurance was
8 cancelled. (*Id.* at ¶ 6). After writing the citation for cancelled insurance, Deputy Parry
9 asked Plaintiff to step out of the vehicle and explained the citation. (*Id.* at ¶ 7). Plaintiff
10 continued to say "Yes, sir. Sorry, sir," while looking at the ground. (*Id.*). Plaintiff signed
11 the citation and was given a copy of the citation, along with the return of his license and
12 registration. (*Id.*).

13 Deputy Parry asked Plaintiff if he could speak with him and Plaintiff said "Yes,
14 sir." (*Id.* at ¶ 8). Deputy Parry told Plaintiff that Plaintiff's body language and trembling
15 made the Deputy nervous. (*Id.*). Deputy Parry asked Plaintiff if he had any contraband
16 in the vehicle and Plaintiff said "no." (*Id.*). Deputy Parry asked for permission to search
17 the vehicle and Plaintiff said "no." (*Id.*). Deputy Parry observed that Plaintiff's tone had
18 changed and Plaintiff had become more aggressive. (*Id.*). Plaintiff raised his voice and
19 demanded a supervisor and canine certification records. (*Id.*). Plaintiff told Deputy Parry
20 that Plaintiff was an ex-federal agent and claimed he was being mistreated. (*Id.*). Deputy
21 Parry explained that he was deploying a K-9 on a free air sniff around the exterior of the
22 vehicle. (*Id.*).

23 At the time of the stop, Deputy Parry was a Canine Handler of the departmental
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25 ⁵ Plaintiff argues that he was not holding this information out of the window and
26 that it was kept in a white envelope above his visor. However, this dispute does not
27 meaningfully change the Court's analysis and, as such, is not material.

1 canine, "Grace," for the Pinal County Sheriff's Office. (*Id.* at ¶13). He was Grace's
2 handler from the summer of 2004 to approximately February or March of 2010, when
3 Grace retired. (*Id.*). Deputy Parry routinely trained with Grace and one entire shift per
4 week was dedicated to drug detection training with Grace. (*Id.*). Grace's performance
5 met the criteria to become certified in narcotics detection [including the odors of
6 marijuana, cocaine, heroin, and methamphetamine]. (*Id.*). Grace was certified through
7 the National Police Canine Association and National Narcotic Detector Dog Association.
8 (*Id.*).

9 Grace sniffed the exterior of the vehicle and gave a positive odor indication at the
10 open driver's window. (*Id.* at ¶ 9). Deputy Parry, believing he had probable cause,
11 began to search the vehicle. (*Id.*). Deputy Parry saw a soft black briefcase on the front
12 seat, which had two pockets open. (*Id.*). Deputy Parry observed \$1,000 in loose
13 currency in the pockets. (*Id.*). Deputy Parry found no contraband in the vehicle. (*Id.* at ¶
14 9). Plaintiff told Deputy Parry that he was driving a work truck and the cash was for
15 payments from rental property. (*Id.*).

16 Plaintiff repeatedly called Deputy Parry a liar and demanded a supervisor. (*Id.*).
17 When Deputy Parry began writing down contact information for his supervisor, Plaintiff
18 stated he did not want it. (*Id.*). Deputy Parry thought that Plaintiff's behavior was
19 escalating and Deputy Parry warned Plaintiff about causing a disturbance to passing
20 motorists. (*Id.*). Deputy Parry called his supervisor regarding the results of the K-9 sniff
21 and was instructed to cite and release Plaintiff for having no insurance. (*Id.* at ¶ 10).
22 Plaintiff was cited for an insurance violation and released. (*Id.* at ¶ 11).

23 The traffic stop lasted for approximately twenty-nine minutes. (*Id.* at ¶ 12).

24 Defendant argues that he is entitled to summary judgment on Plaintiff's § 1983
25 claim based on an alleged Fourth Amended violation during the traffic stop. Defendant
26 argues that he is entitled to summary judgment because (1) he had reasonable suspicion
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1 to make an investigative traffic stop when he observed Plaintiff's inoperable brake light;
2 (2) the twenty-nine minute stop was reasonably needed to effectuate the purposes of the
3 stop, including checking Plaintiff's license, registration, and insurance, to perform a
4 canine free air sniff after Plaintiff behaved unusually, and to search Plaintiff's car once
5 there was probable cause; (3) Defendant's request to speak with Plaintiff, after the
6 issuance of the citation, was lawful and did not require reasonable suspicion of drug
7 trafficking; (4) the use of the police canine to perform an exterior sniff did not transform
8 a lawful investigatory stop into a lawful arrest; and (5) probable cause existed to search
9 Plaintiff's vehicle. Defendant Parry argues that he is entitled to qualified immunity and
10 that Plaintiff's punitive damages claim must be dismissed.

11 Defendant first argues that his observance of Plaintiff's inoperable brake light
12 provided reasonable suspicion to stop the vehicle. A traffic violation can provide
13 reasonable suspicion for a brief investigatory stop. *U.S. v. Gutierrez-Mederos*, 965 F.2d
14 800, 803 (9th Cir. 1992). Plaintiff argues that Defendant did not pull him over because
15 his brake light was inoperable. This argument is inconsistent with Plaintiff's response to
16 Defendant's Request for Admission regarding whether the brake light was in operable at
17 the time of the stop. In Response to the Request for Admission, Plaintiff stated that he
18 did not know whether the brake light was inoperable and that only Defendant Parry could
19 answer that question. (Doc. 116 at ¶ 3). In that Response, Plaintiff also admitted that,
20 after the traffic stop, "the brake light sometimes functioned. Plaintiff eventually changed
21 the right rear brake line harness." (Doc. 125 at ¶ 11).

22 Nonetheless, Plaintiff argues that his response to Defendant's Request for
23 Admission as to whether he had a defective brake light should not be used against him at
24 the summary judgment stage because it was an attempt "to provoke a response from
25 Plaintiff." (Doc. 118 at 3 n.3). Plaintiff is correct that Defendant's service of requests
26 for admission on him was indeed an attempt to provoke a response from Plaintiff.

1 Indeed, Requests for Admission are specifically contemplated and allowed by Federal
2 Rule of Civil Procedure 36. Moreover, once Plaintiff makes an admission in response to
3 a request for admission, it is “conclusively established.” Fed. R. Civ. P. 36(b). Plaintiff
4 may not now contradict his earlier admissions in an attempt to create an issue of fact
5 solely to avoid summary judgment. *See Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262,
6 266 (9th Cir. 1991) (when a party attempts to introduce “sham” testimony that flatly
7 contradicts earlier testimony in an attempt to “create” an issue of fact and avoid summary
8 judgment, the Court must not consider such “sham” testimony in ruling on the motion for
9 summary judgment.).

10 Plaintiff also argues that Defendant Parry could not have seen the defective brake
11 light from the position where he first witnessed Plaintiff’s car. (Doc. 128 at 3).
12 However, Plaintiff also admits that Deputy Parry followed him before initiating a stop.
13 (Doc. 118 at 6). Plaintiff’s speculative, self-serving and contradictory statements are not
14 enough to establish a genuine issue of material fact. Plaintiff himself admitted that his
15 brake lights only worked intermittently and he did not know whether or not the brake
16 light was working when Defendant Parry initiated the stop. Defendant Parry avows that
17 the brake light was not working and that avowal is undisputed. Accordingly, the
18 uncontradicted evidence in this Court’s record shows that Defendant Parry initiated the
19 traffic stop because Plaintiff had an inoperable brake light. This violation provided
20 probable cause for Defendant Parry to initiate a brief investigatory stop of Plaintiff.

21 As a result, there is no genuine disputed issue of material fact as to whether
22 Defendant Parry had reasonable suspicion or probable cause to make a brief investigatory
23 stop of Plaintiff.

24 Plaintiff also argues that the true purpose of the stop was so that Deputy Parry
25 could seize large sums of money in connection with a drug trafficking organization.
26 However, even if this were true, the subjective motivation of a police officer is irrelevant
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1 in cases such as this, where there is reasonable suspicion or probable cause to perform a
2 traffic stop. *See Whren v. U.S.*, 517 U.S. 806, 813 (1996); *U.S. v. Lopez-Soto*, 205 F.3d
3 1101, 1104 (9th Cir. 2010); *U.S. v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000).

4 Defendant next argues that the twenty-nine minute traffic stop was lawful and did
5 not convert the investigatory stop into an arrest. “In assessing whether a detention is too
6 long in duration to be justified as an investigative stop, [the court] . . . should examine
7 whether the police diligently pursued a means of investigation that was likely to confirm
8 or dispel their suspicions quickly, during which time it was necessary to detain the
9 defendant.” *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985). In this case, there is no evidence
10 that Defendant Parry did not diligently pursue his investigation. Indeed, Defendant Parry
11 checked Plaintiff’s license, registration, and insurance, gave Plaintiff a citation, spoke
12 with Plaintiff, conducted a dog sniff, and searched the vehicle within a twenty-nine
13 minute timeframe. Plaintiff argues that the stop was delayed so that Defendant Parry
14 could ask Plaintiff about his “alleged nervousness.” (Doc. 118 at 5). However,
15 Plaintiff’s challenge is not to the reasonableness of the length of the stop, but rather
16 whether it was appropriate for Defendant Parry to question Plaintiff about his
17 nervousness. The Court will discuss the latter argument *infra*.

18 Accordingly, there is no genuine disputed issue of material fact as to the
19 reasonableness of the length of the traffic stop.

20 Defendant next argues that his request for permission to speak with Plaintiff after
21 the issuance of the citation and questioning Plaintiff about drug possession was lawful
22 and did not require reasonable suspicion of drug trafficking. Plaintiff argues that
23 Defendant did not request permission to speak with him, but rather said “hold on,” and
24 then proceeded to question Plaintiff about his nervousness and whether he was in
25 possession of drugs. Plaintiff argues that, Deputy Parry stating “hold on” before asking
26 these questions, transformed the investigatory stop into an arrest. For the purposes of

1 summary judgment, the Court will assume that Plaintiff's version of the facts are true,
2 namely, that Defendant Parry told Plaintiff to "hold on," before asking him questions
3 unrelated to the reasons for the traffic stop itself.

4 "There is no bright line rule for determining when an investigatory stop crosses
5 the line and becomes an arrest. . . . Rather, whether a police detention is an arrest or an
6 investigatory stop is a fact-specific inquiry, [which requires the Court to] consider all the
7 circumstances surrounding the encounter between the individual and the police, by
8 evaluating not only how intrusive the stop was, but also whether the methods used by
9 police were reasonable given the specific circumstances." *Gallegos v. City of Los*
10 *Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (internal citations and quotations omitted;
11 emphasis omitted).

12 Defendant's statement of "hold on" to Plaintiff and then asking Plaintiff a few
13 questions about his nervousness and whether or not there were drugs in the car did not
14 unreasonably prolong the investigatory stop, did not transform the investigatory stop into
15 an arrest, and were not unreasonable given Plaintiff's nervous behavior throughout the
16 citation process. *See, e.g., Gallegos*, 308 F.3d at 991 (under totality of circumstances
17 where police suspected suspect of involvement in burglary due to his proximity to scene,
18 officers ordering suspect from his truck at gunpoint, handcuffing him, putting him into
19 the back of a patrol car, and detaining him for between forty-five minutes to an hour did
20 not transform investigatory stop into an arrest). Moreover, the fact that Defendant's
21 questions were not on the same topic as the reason for the traffic stop did not
22 unreasonably prolong the stop. *U.S. v. Turvin*, 517 F.3d 1097, 1103-1104 (9th Cir. 2008)
23 ("officers do not need reasonable suspicion to ask questions unrelated to the purpose of
24 an initially lawful stop . . . [where the questions do] not unreasonably prolong the
25 duration of the stop."); *Muehler v. Mena*, 544 U.S. 93, 101 (2005).⁶

26
27 ⁶ Alternatively, Defendant Parry had reasonable suspicion independent of the

1 Defendant next argues that his use of a police canine did not transform the lawful
2 investigatory stop into an unlawful arrest. “[T]he use of a well-trained narcotics-detection
3 dog—one that “does not expose noncontraband items that otherwise would remain
4 hidden from public view[,] . . . during a lawful traffic stop, generally does not implicate
5 legitimate privacy interests.” *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (internal
6 citation omitted). In this case, the dog sniff was performed on the exterior of Plaintiff’s
7 car, while he was lawfully detained for a traffic violation. As a result, any intrusion on
8 Plaintiff’s privacy expectations related to the dog sniff does not rise to the level of a
9 constitutionally cognizable infringement. *See id.*

10 Defendant finally argues that probable cause existed to further detain Plaintiff and
11 search Plaintiff’s vehicle. In Response, Plaintiff argues that a search of the whole car
12 was unwarranted because the K-9 “only” alerted at the driver’s door of Plaintiff’s car.
13 (Doc. 188 at 3-4). In subsequent response motions, Plaintiff argues that the K-9 never
14 alerted. (Doc. 128 at 18; Doc. 158 at 3). These contradictory statements are not enough
15 to establish a genuine issue of material fact. Moreover, there is no evidence in the
16 Record that the canine did not alert or that Plaintiff has the requisite knowledge and/or
17 expertise to identify an “alert” from the canine. The only evidence in the Record is
18 Deputy Parry’s testimony that his canine did alert on the driver’s door of Plaintiff’s car.
19 Accordingly, there is no dispute that the canine did alert at the driver’s door of Plaintiff’s
20 car.

21 Plaintiff appears to argue that because the canine “only” alerted at the driver’s side
22 door, Defendant Parry only had probable cause to search the drivers’ side door. Plaintiff

23 traffic stop to ask Plaintiff questions about the possibility of drugs in the vehicle. Such
24 reasonable suspicion is supported by the following facts: Deputy Parry received a report
25 that a white Chevy truck connected with illegal drug activity was traveling his way;
26 Deputy Parry saw Plaintiff in his white Chevy truck arrive in his area around the time
27 expected; after Deputy Parry stopped Plaintiff for a legitimate traffic violation, Plaintiff
28 behaved in an unusually nervous manner.

1 provides no support for this argument. Indeed, once the canine alerted to the scent of
2 drugs in the car, Detective Parry had probable cause to search the car. *See U.S. v. Ibarra*,
3 345 F.3d 711, 716 (9th Cir. 2003) (finding that where detective walked drug-detecting
4 dog around the car and dog alerted to door of car, the detective had probable cause to
5 search the car); *Wyoming v. Houghton*, 526 U.S. 295, 301-302 (1999) (holding that if
6 police officers have probable cause to lawfully search a stopped vehicle, they may
7 conduct a warrantless search of any containers found inside that may conceal the object
8 of the search).

9 Plaintiff also argues that Defendant Parry, his supervisors, and the Pinal County
10 Sheriff's Office did not comply with their own Canine Manual. (Doc. 151). Plaintiff
11 fails to support this conclusory assertion with any evidence. Accordingly, there is no
12 genuine disputed issue of material fact regarding whether the canine was properly
13 trained. Deputy Parry's undisputed testimony demonstrates that K-9 Grace was trained
14 and properly certified through the National Police Canine Association and National
15 Narcotic Detector Dog Association. (Doc. 116 at ¶ 13).⁷

16
17
18 ⁷ Plaintiff also appears to argue that Defendant unlawfully stopped and frisked
19 him. In its Order granting Defendants' Motion to Dismiss, the Court stated:

20 The Pinal County Defendants acknowledge that
21 Plaintiff likely intended to state a Section 1983 Fourth
22 Amendment claim against Defendant Parry for the October 6,
23 2009 traffic stop and that Plaintiff has alleged enough facts to
24 survive a motion to dismiss on this claim. Because the Pinal
25 County Defendants have not moved to dismiss this part of
26 Count 7, the Court will only analyze the remaining
27 allegations in Count 7.

28 Because Count 7 contains only conclusory statements
as to the remaining Defendants' alleged violations of
Plaintiff's constitutional rights and fails to provide any factual

1 Based on the foregoing, Deputy Parry's conduct was constitutionally acceptable.
2 Accordingly, because a reasonable officer in Deputy Parry's position could have believed
3 that his conduct was constitutionally acceptable in light of the clearly established law and
4 the information Deputy Parry possessed, Deputy Parry is entitled to qualified immunity.
5 *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

6 Moreover, Plaintiff has failed to present any evidence that Defendant Parry's
7 conduct was motivated by evil motive or intent or involved a reckless or callous
8 indifference to Plaintiff's federally protected rights. Accordingly, Defendant is entitled
9 to summary judgment on Plaintiff's punitive damages claim. *See Smith v. Wade*, 461
10 U.S. 30, 56 (1983).

11 **XII. Conclusion**

12 Based on the foregoing,

13 **IT IS ORDERED** that Plaintiff's Motion for Reconsideration (Doc. 113) is
14 denied.

15 **IT IS FURTHER ORDERED** that Plaintiff's Motion to File Supplement (Doc.
16 122) is granted to the extent that the Court will consider the Supplemental to Objection
17 for Summary Judgment (Doc. 122 at 5-41) in ruling on the Motion for Summary
18 Judgment.

19 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike (Doc. 127) is
20 denied.

21 **IT IS FURTHER ORDERED** that Plaintiff's Request for Leave to File Amended
22 Response (Doc. 128) is granted to the extent that the Court will consider the Amended

23 basis for Plaintiff's claims, Count 7 will be dismissed without
24 prejudice.

25 (Doc. 42 at 10). Accordingly, because Plaintiff did not state a claim against Defendant
26 based on an unlawful frisk, Plaintiff's attempt to add such a claim at the summary
27 judgment stage is not appropriate and the Court will not discuss this claim further.

1 Response to Defendant Parry's Separate Statement of Facts (Doc. 128 at 13-35) in ruling
2 on the Motion for Summary Judgment.

3 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike (Doc. 133) is
4 denied.

5 **IT IS FURTHER ORDERED** that Plaintiff's Request for Leave to File Rule
6 60(b)(4) Relief from Judgment (Doc. 134) is denied.

7 **IT IS FURTHER ORDERED** that Plaintiff's request that the Court review
8 exhibits (Doc. 140) is denied.

9 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike (Doc. 150) is
10 granted. The Clerk of the Court shall strike Doc. 149.

11 **IT IS FURTHER ORDERED** that Plaintiff's Request for Leave to File Letter
12 (Doc. 154) is denied.

13 **IT IS FURTHER ORDERED** that Plaintiff's Request for Leave to File Exhibit 1
14 and 2 (Doc. 161) is denied.

15 **IT IS FURTHER ORDERED** that Plaintiff's Request for Telephonic Call (Doc.
16 164) is denied as moot.

17 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Withdraw Request for
18 Telephonic Call and Leave to File for Consideration based on Ninth Circuit Decisions
19 (Doc. 165) is denied.

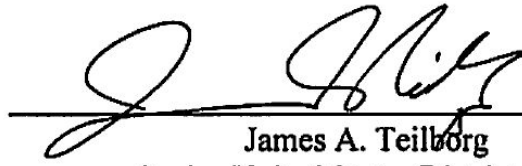
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1 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment
2 (Doc. 115) is granted. Because this resolves the only remaining claim in this case, the
3 Clerk of the Court shall enter judgment for Defendants accordingly.

4 Dated this 9th day of September, 2013.

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7 James A. Teilborg
8 Senior United States District Judge
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